

On BAILMENT and HUBRIS

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The issue occasionally arises when even the most erudite of PAs faces the fact that he might not know all there is to know.

Through implementation of a local TQM initiative, I review all solicitations and contracts for the U.S. Army Yuma Proving Ground before they are final. This process ensures that government furnished property issues are correctly and promptly addressed and the government's interests are safeguarded. It works well and has proven beneficial to the acquisition process. As one of the authors of the initiative and the only Property Administrator (PA) on site, I take great pride in providing prompt and correct information to my Contract Specialists. However, the issue occasionally arises when even the most erudite of PAs faces the fact that he might not know all there is to know.

It was a simple issue—reviewing a solicitation to ship government property to a contractor for modification and return it to Yuma Proving Ground on completion.

“No sweat!” quoth the noble PA, happily dispensing the largesse of his knowledge to the Contract community. “Simple issue—just put a bailment clause in and it will take care of itself.”

“Excellent,” responded the Contracting Officer, “Find me one.”

This was going to be easy. I confidently whiped out my copy of the “Junior Woodchuck’s Handbook” (or “Property Administration Reference” provided gratis by those wonderful people at the Air Force Institute of Technology, if you must!) and leafed through its elegantly embellished pages.

“Bailment, bailment, lessee... bailment. Mmmm. Not here. Not here, nowhere. DoD M 4161.2-M defines it, but where is there a ‘bailment’ clause? No FAR clause specifically dedicated to bailment? Oops.”

I needed help. I needed expertise. I needed the all-seeing, all-knowing input of those dual gurus of GFP, Dr. Douglas Goetz and John Paciorek! I picked up the trusty panic line on my desk, and, making proper obeisance to the East, hit the autodialer coded to their lush penthouse offices. I learned that the FAR does indeed have a clause relating specifically to bailment—except it only covers Air Force aircraft. Nothing that really cov-

ered my case.

Skirting sarcasm with great effort, my Administrative Contracting Officer suggested that I write a bailment clause, because it sounded like something that we could really use. She also suggested that I might want to forward it to the people who write the FAR for inclusion.

Thus tasked, I eagerly set to work. Already I had mentally drafted the clauses, revelling in my brilliantly worded arguments and exacting phraseology. I could hear the adulation of my peers and contemporaries ringing in my mind. Rooting through stacks of dusty tomes, perusing arcane volumes of governmentese, I found the touchstone, the alchemists dream, the answer to the issue!

The bailment clause already exists.

The GSA Training Center Text for Government Property Administration, revised in June 1987, covers the issue very nicely:

“When the government delivers property to a contractor to be held in its care and trust, for a specific purpose and a limited amount of time, a ‘bailment’ has been created.”¹

Okay—so we are going to furnish government property to a contractor. Now what?

Looking at property, we see four characteristics commonly present. These are value, dominion, identification, and transferability.

It must have a discernable value; without a degree of scarcity or utility, there is no point in owning it. There must be dominion, that is, you must be able to own and control it. It must be identifiable and finite (which of the wild kangaroos in Australia did you say you owned? Can you point him out?) And the property must be transferrable, that is, because you own it and can define it, you can give it up. (Ever try to give away a cloud?)

Given the characteristics of property, we then consider ownership, or title, without which a transfer is not possible: There is legal title, that is, who the law recognizes as the owner of the property and thus gives the power to transfer, use, loan, or dispose of it. And there is

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equitable title, which is recognized in law as the right to use property to which you do not hold title for some set purpose.

Loaning property for a specified purpose provides equitable title so long as the legal elements of a contract are met; namely, that the parties be able to enter into a legal agreement, that the agreement is for a lawful purpose, that there is consideration exchanged, that the contract state a specific purpose with specified times for performance, etc.

Legal title is thus the owner's "right to use, bail, sell, dispose"²...of property. Equitable title is the user's "right to use for specific purposes, for a specific time; and disposal; stated in specific bailment agreement."³

When the government agrees to provide property for performance of a contract, it creates, through the terms of the contract, a legal agreement defined as "bailment." To be effective, the bailment should include the following:

- (1) A description (type, condition, and quantity) of the property;
- (2) A schedule for delivery (if government furnished) or acquisition (if purchased by the contractor);
- (3) Conditions under which the type, quantity or schedule of delivery may be altered;
- (4) Who has legal versus equitable title and their respective rights and obligations, accordingly; and
- (5) Consideration, if any, owed by the equitable titleholder for use of the property."⁴

So, there, before me, on the carefully preserved parchment of the ancient volume (ok-newsprint) burned the revelation that the "Bailment agreement is represented by the Property Clauses in Government Contracts (FAR 52.245)."

"What—Can this be? Has this been here all along?"

"Yes, oh font of wisdom and source of knowledge, these have been in the FAR all along..."

A careful review convinced me that all five of the factors listed above are in fact present in the Government Furnished Property (FAR 52.245) Clauses. There is absolutely no need to go forth and astonish my peers and compatriots in the property field with my wisdom and I really do need to go talk to my Contracting Officer.

Would anyone out there care to share a good recipe for crow? ♦

ENDNOTES:

1. Government Property Administration Student Text. General Services Administration Training Center, Washington DC 2040b, Revised June 1987, Page 5.
2. Ibid. Page 6c
3. Ibid. Page 6c.
4. Ibid. Page 6.

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